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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-5015 (5798)

JON RICHARD ARGERSINGER,

Petitioner,

-vs-

RAYMOND HAMLIN,

Respondent.

On Writ of Certiorari to the
Supreme Court of Florida

BRIEF OF RESPONDENT

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BRIEF OF RESPONDENT

OPINION BELOW

The opinion of the Florida Supreme Court which is subject matter of this appeal, is reported at 236 So.2d 442.

JURISDICTION

This Court has jurisdiction pursuant to the provisions of 28 U.S.C. §1257(3).

QUESTION PRESENTED

WHETHER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION REQUIRE THE APPOINTMENT OF COUNSEL TO REPRESENT AN INDIGENT DEFENDANT CHARGED WITH A "PETTY OFFENSE" IN A STATE COURT.[1]

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional provisions involved in this case, to-wit: the Sixth and Fourteenth Amendments are reproduced in Petitioner's brief and will not be repeated herein.

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1. The Respondent has rephrased the issue since the parties agreed in the Florida Supreme Court that the offense was a petty offense. The Petitioner asserted that he was entitled to counsel appointed to represent him notwithstanding the fact that he was charged with only a petty offense. Even the main brief filed herein considers the charge as a petty offense for counsel candidly admits that if this Court meant to settle the issue by adoption of the Rules of Procedure for the Trial of Minor Offenses Before Magistrates "...then all is lost for the petitioner..." (brief at page 35)

STATEMENT OF THE CASE

The statement of the case as set forth on page three and four of Petitioner's brief is acceptable to the Respondent except the Respondent wishes to note that it was affirmatively alleged that Petitioner was above average intelligence and fully capable of understanding the nature, quality and consequences of his acts. (App. 5, par.VII) This allegation was never contradicted or denied by Petitioner and thus must be assumed as true. Moreover, it was not alleged by Petitioner that he was not advised of his right to retained counsel. (App. 2) It was conceded that he was not advised of his right to appointed counsel. The fact that the record is silent can be of no benefit to Petitioner for the State announced, in open court, before the Florida Supreme Court that there was a violation of Boykin v. Ala., 395 U.S. 238 (1969), but Mr. Shea orally waived that deficiency in order to obtain a resolution of the issue presented to this Court. Indeed, he was asked by the court whether he had authority to waive the defect and he assured the court that he did. Accordingly, he cannot now seek to use the absence of a record to his benefit, either directly or indirectly.

QUESTION PRESENTED

WHETHER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION REQUIRE THE APPOINTMENT OF COUNSEL TO REPRESENT AN INDIGENT DEFENDANT CHARGED WITH A "PETTY OFFENSE" IN A STATE COURT.

ARGUMENT

The Florida Supreme Court held there was no absolute organic right to appointed counsel for indigents charged with a "petty offense" thereby rejecting the position advanced by the Petitioner to-wit: that counsel must be appointed whereever there may be "involuntary incarceration for 10, 20, 30 or 60 days." The Florida Supreme Court, at the urging of Respondent, receded from the misdemeanor-felony dicotomy upon which their prior decisions rested--Fish v. State, Fla. 1964, 159 So.2d 866, and held that in instances where the maximum penalty authorized was six months or less appointed counsel was not required. The Court did not conclude that a trial judge lacked authority, in the exercise of his discretion, to appoint counsel to represent an indigent person where the nature of the charges and/or the education, experience and ability of the accused is such that he is incapable of understanding or appreciating the nature

thereof or presenting an intelligent defense thereto. That was unnecessary to a disposition of the case since there were no allegations by Petitioner that he was unable to understand the nature of the charges against him.

The Supreme Court, in the opinion presently being reviewed, adopted the reasoning and conclusions expressed by Judge Mehrtens in Brinson v. State, S.D. Fla. 1967, 273 F.Supp. 840. Judge Mehrtens in Brinson, supra, in an exhaustive treatment of the issue, stated:

> "...The Supreme Court, in Gideon v. Wainwright,has explicitly receded from the view that right to counsel depends upon the particular circumstances of any case. The facts of the Gideon case, however, as noted by Mr. Justice Harlan, 372 U.S. at 351, 83 S.Ct. 792, 9 L.Ed 2d 799, did not require determination of whether the rule should extend to all criminal cases. Therefore it is doubtful whether Evans v. Rives compelled the Fifth Circuit in Harvey to hold that a 'serious offense' distinction could not be applied after Gideon to state charges not denominated felonies. Harvey may be limited because of the particularly flagrant circumstances involved in the case. A literal reading of the opinion, however, would indicate that the possibility of even a ninety-day

jail sentence is a sufficient deprivation of liberty to run afoul of due process unless defendant is given assistance of counsel.

"In a very similar case involving a Florida misdemeanor charge, McDonald v. Moore, 353 F.2d 106 (5th Cir. 1965), Judge Jones speaking for the court stated that 'this Court has, we think, rejected the "serious offense" rule. We also think that Gideon has repudiated the Betts v. Brady ad hoc special circumstances rule ***' Id. at 110. Being of the opinion that Harvey controlled the decision due to the similarity of the facts, the McDonald case was decided purely on the basis of stare decisis. The court, however, did not have the benefit of the Supreme Court's decision in the Gault case. It is now evident from Gault that the seriousness of the offense charged has direct bearing on the constitutional right to counsel.

"Accordingly, this Court holds that the constitutional right to counsel in non-felony cases depends upon the maximum possible penalty under the offense charged, this being the test whether or not a 'serious offense' is involved. In order that rights of

constitutional statute be uniformly applied, I hold that the minimum offense for which counsel must be provided is one which carries a possible penalty of more than six months imprisonment, which is the line of demarcation drawn in federal practice. In this case, Brinson's second and third conviction of leaving the scene of an accident involving personal injuries must be invalidated since the court failed to notify the defendant of his right to the assistance of counsel.

"This Court has not overlooked the contention that if the right to counsel is extended beyond the holding of Gideon to any misdemeanor, that a fortiori the right must be extended to all misdemeanors. The right to counsel should not be treated as an abstract theorem, but rather as a means for achieving the most perfect justice possible in a given situation. The essence of the right is to protect those charged with crimes from wrongful conviction. However, that right is qualified by practical exigencies.

"If Gideon is extended to all misdemeanors, its effect would be profound and create a tremendous economic and administrative burden since only a small minority of states now require appointment of

counsel for indigents in misdemeanor cases. The demands upon the bench and bar would be staggering and well-nigh impossible. Such a construction could lead to the appointment of counsel for misdemeanors not normally considered criminal, such as overparking and other petty traffic offenses, jaywalking, dropping trash upon the sidewalk, and like offenses. Further, to hold that the right to court-appointed counsel exists in all misdemeanor cases would in effect also be to hold that the portion of the Criminal Justice Act relating to petty offenses is unconstitutional, since surely the federal courts must be held to the same standards they impose upon the state courts under the Sixth and Fourteenth Amendments..."

"...The right to counsel guaranteed by the Sixth and Fourteenth Amendments is not an absolute right, nor are any of the rights guaranteed by the Constitution 'absolute.' See Creighton v. State of North Carolina, 257 F. Supp. 806 (E.D.N.C. 1966). As stated in that case, the Constitution was not written to provide an exercise in abstract idealism but as a practical guide for the management of the affairs of this country and the protection of the rights of its citizens. In today's complex society there can be no

truly 'absolute' rights. Thus, the right to free exercise of the religion of one's choice is on its face absolute, but in application is limited since a religion requiring illegal activities would not be constitutionally protected. One cannot refuse to pay taxes because of religious scruples, nor can one engage in polygamy or any other practice directly harmful to the safety, morals, health or general welfare. West Va. State Board of Education v. Barnette, 319 U.S. 624, 63 S. Ct. 1178, 87 L.Ed. 1628 (1942); Late Corporation of the Church of Jesus Christ of Latter Day Saints v. United States, 136 U.S. 1, 10 S.Ct. 792, 34 L.Ed. 478 (1889); Reynolds v. United States, 98 U.S. 145, 25 L.Ed. 244 (1878). The 'absolute right' to free speech has been qualified and curtailed by libel and slander laws. Such right, on occasion, must be subordinated to other values and considerations. Dennis v. United States, 341 U.S. 494, 71 S.Ct. 857, 95 L.Ed. 1137 (1950). It does not confer the right to persuade others to violate the law. Bullock v. United States, 265 F. 2d 683 (6th Cir. 1959); cert. den., 360 U.S. 909, 79 S.Ct. 1294, 3 L. Ed. 1260. Neither does such right preclude Congress from excluding obscene matter from the mails or from punishing persons advocating

> overthrow of the government by force. United States v. Bryan, 83 U.S. App. D.C. 127, 167 F.2d 241; cert. den. 334 U.S. 843, 68 S.Ct. 1511, 92 L.Ed. 1767. Likewise, the 'absolute right' to counsel in all criminal prosecutions must be qualified by practical exigencies and, unless this is done, the necessities of sound judicial adminstration would be disregarded and the administration of justice thrown into senseless chaos." (Emphasis supplied)

The same conclusions have been reached by other courts which have dealt with this issue. State v. DeJoseph, Conn.App. 1966, 222 A.2d 752, cert. den. 385 U.S. 982; Cableton v. State, Ark. 1967, 420 S.W.2d 534; Hendrix v. City of Seattle, Wash. 1969, 456 P.2d 696, cert.den. 397 U.S. 948 (1970); State v. State Dept. of Health and Social Services, Wis. 1968, 155 N.W.2d 549; MacDonnel v. Commonwealth, Mass. 1967, 230 N.E.2d 821; Burrage v. Superior Court, Ariz. 1969, 459 P2d 313; Hortencio v. Fillis, Utah 1970, 475 P.2d 1011 (1970); Newell v. State, Me. 1971, 277 A.2d 731; Wall v. Purdy, S.D.Fla. 1971, 321 F.Supp. 367 (1971); cf. Winters v. Beck, D.C.Ark. 1968, 281 F.Supp. 793, aff'd Beck v. Winters, 8th Cir. 1969, 407 F.2d 125.

In Wall v. Purdy, supra, Judge Mehrtens reaffirmed the position he espoused in Brinson, supra, and correctly observed that the "federal courts cannot and should not

require more from the state courts than the federal government itself has determined it will provide..." 321 F.Supp. at 373-74. Judge Mehrtens referred to the fact that the Criminal Justice Act of 1964 (18 U.S.C. §3006 A) as amended, contemplated the appointment of counsel in felony or misdemeanor cases but not in cases falling within those classed as petty offenses. 321 F.Supp at 373. A petty offense, as defined by 18 U.S.C. §1(3) is "[a]ny misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than $500, or both,..."[2]

Judge Mehrtens reviewed the decisions emanating from the Court of Appeals, Fifth Circuit, and like the Florida Supreme Court, noted the Court of Appeals has "neither clarified the question...nor been of any real assistance to the trial courts, both federal and state, which are constantly besieged and beset with this problem..." 321 F.Supp. at 372 The Fifth Circuit Court of Appeals in Harvey v. State of Mississippi, 5th Cir. 1965, 340

2. The amount of the fine is irrelevant when dealing with the right to counsel for indigents because the defendant is unable to pay the fine and imprisonment in lieu of payment thereof cannot legally exceed the period of authorized imprisonment. Tate v. Short, 401 U.S. 495 (1971)

F.2d 263, refused to apply the "petty offense" theory on the grounds that there was no authority to distinguish between a "serious offense" and a "petty offense", but has since required the appointment of counsel in all cases where the defendant faces a possible 90 day imprisonment or a $500.00 fine. James v. Headley, 5th Cir. 1969, 410 F.2d 325; Wooley v. Jacksonville, 5th Cir. 1970, 433 F.2d 980, cert. pending; and Alvis v. Kimbrough, 5th Cir. 1971, ___F.2d____, Opinion filed July 8, 1971, not yet reported. Thus the Court of Appeals, Fifth Circuit, has recognized the "petty offense" doctrine but has drawn the line at 90 days rather than six months. Implicit in such holdings is a recognition that the right to counsel is not absolute and the dispute reduces itself to where the line should be drawn.

The Respondent suggests it should be drawn at six months which would be consistent with the line selected by the United States Congress, the majority of courts that have considered the question and the line drawn by this Court in Baldwin v. New York, 399 U.S. 66 (1970), in determining when the Sixth Amendment right to trial by jury was required. Respondent fails to understand how it could be legally argued that one standard should govern the right to a jury trial but a different standard should be used to determine the right to appointed counsel. The Sixth Amendment makes no such distinction and the right to counsel and trial by jury are both secured by that same provision. If the Sixth Amendment right to trial by

Jury does not apply to a "petty offense" case and the decisions of this Court clearly hold it does not, Duncan v. Louisiana, 391 U.S. 145 (1968); Baldwin v. City of New York, supra, the right to counsel guaranteed by that same amendment should not be applicable. Beck v. Winters, supra. In that case the Eighth Circuit Court of Appeals, observed:

> "It should be remembered that the Sixth Amendment makes no differentiation between misdemeanors and felonies. The right to counsel is not contingent upon the length of the sentence or the gravity of the punishment. Rather, it provides that the guarantee extends to 'all criminal prosecutions.' Furthermore, we note that the phrase 'all criminal prosecutions' applies not only to the right to counsel but also to the right to a jury trial. Logically the phrase should be accorded the same meaning as applied to both protections. Thus we believe significant the Supreme Court's pronouncements in cases involving the jury trial guarantee." (Emphasis added)

See also: Wall v. Purdy, supra, at page 372. Indeed in Baldwin, supra, this Court held a "petty offense" is not a "criminal prosecution" within the meaning of the Sixth Amendment and it seems from that alone counsel would not be required since the right to counsel applies only to criminal proceedings.

In Newell v. State, supra, the Supreme Court of Maine,after noting this Court's recent adoption of the Rules of Procedure for the Trial of Minor Offenses before Magistrates issued on January 27, 1971 (39 L.W. 3330) concluded:

> "We are convinced that the time has come when due process demands that we abandon the felony-misdemeanor distinction as a basis for appointment of counsel and construe our own constitution to require appointment of counsel for needy persons charged with serious misdemeanors, unless waived.
>
> "Our statutes define 'felony' as including every offense punishable by imprisonment in the State Prison. 15 M.R.S.A. §451. We know that the distinction between misdemeanors and felonies is often only a convenient method of classification with little real significance and that in many instances the maximum possible confinement in a County Jail provided by a statute for some misdemeanors may be only 30 days shorter than the minimum period of imprisonment in our State Prison provided for most felonies. Using the category titles of felony and misdemeanor in determining right to counsel is particularly unconvincing in this state where 34 M.R.S.A. §802 provides that any male between the age of 17 and 26, upon conviction of any misdemeanor which is punishable by imprisonment in

the county jail (as most are), may be committed to the Men's Correctional Center for an indeterminate period which can last as long as three years. 34 M.R.S.A. §853 makes a similar provision for sentence to the Women's Correctional Center of women between the ages of 17 and 40. These people, although charged with misdemeanors, face possible confinement for longer terms than can be imposed on convictions of at least one felony. 17 M.R.S.A. §3152.

"The defense of many misdemeanor charges may demand professional assistance as urgently as that of many felony trials and may result in loss of liberty. While no loss of liberty can be considered trivial, it seems to us that the individual's need for legal assistance must be weighed carefully against society's ability reasonably to furnish it.

"We know that during this century the legislature has created a great many new misdemeanor offenses which are of relatively minor nature, such as some traffic and fish and game violations, for example. Many thousands of such violations come before our District Courts yearly and we are convinced that to extend the obligation to provide counsel to minor charges

of these types would impose a presently insupportable burden upon the court system and the bar with a seriously adverse effect upon all litigants' rights to prompt attention to their problems in the courts. No right is absolute and a fair standard must be found upon which to balance the public interests and the individual's rights under due process.

"We conclude that this balance can best be achieved by distinguishing between petty and serious misdemeanors using as a satisfactory guideline the rules that the United States Supreme Court saw fit to prescribe only three months ago. We consider that the distinction between 'petty' and 'serious' satisfies the demands of due process and that it serves a proper governmental purpose and achieves a reasonable balance of the public interests and the individual's rights to the satisfaction of the equal protection clause.

"Therefore, we hold that all indigent persons who are without attorneys and who are facing criminal charges which might result in the imposition of a penalty of imprisonment for a period of more than six months or a fine of more than $500 or both (including those persons subject to potential confinement in either the Men's or the

> Women's Correctional Center) must be informed by the Court of their right to appointed counsel and must have such counsel appointed unless they waive this right."

The Respondent agrees with the foregoing except with respect to the amount of the fine determining the right to counsel since it is irrelevant to an indigent (see Footnote 2), and urges that this Court hold an indigent is not entitled to appointed counsel as a matter of right in those cases where the maximum period of authorized confinement is six months or less, unless, of course, the nature of the charge itself prevents it from being considered "petty" notwithstanding the punishment authorized. This does not mean the trial courts would not be authorized and indeed, in some instances, required to appoint counsel because of "special circumstances." In "petty offense" cases the courts should exercise discretion and should appoint counsel where the circumstances and justice requires it. State v. DeJoseph, supra; MacDonnel v. Commonwealth, supra; State v. State Dept. of Health and Social Services, supra; and Winters v. Beck, supra.

The adoption of this position would not collide with the prior decisions of this Court rendered in Powell v. Alabama, 287 U.S. 45 (1932); Gideon v. Wainwright, 372 U.S. 335 (1963); or In Re Gault, 387 U.S. 1 (1967), for every one of those cases involved "serious" felonies imposing a death penalty or extensive periods of

incarceration. Due process required the appointment of counsel in those cases. It does not require it in cases involving petty offenses.

The Petitioner makes much of the fact that counsel should be provided in petty offenses since the defendants in those cases, as in all others, face "the awesome prospect of incarceration." This argument is indeed appealing on its face. However, an examination of the actualities of our criminal justice system discloses that the argument lacks substantial merit in fact. Respondent would direct the Court to page 40, footnote 218, of the Petitioner's brief, which reads as follows:

> "For instance, in New York in 1969, 1,803.049 people were convicted of violations including jaywalking and speeding and other traffic infractions. Of this number a total of forty (40) persons were fined and imprisoned, given a suspended sentence, or incarcerated or sent to a reformatory. Source: Criminal Court of the City of New York Annual Report of 1969, p. 13, Table 3, line 11. The same table, at line 20, reflects that of the 18,615 convictions of vehicular misdemeanors: driving while intoxicated, reckless driving, leaving the scene of an accident, 332 or 1.8% were incarcerated in some way."

What this table discloses is that in New York for the year 1969 slightly more than twenty-thousandths of one percent of those persons charged with minor offenses, including traffic offenses up to speeding violations, were ever incarcerated in any manner. Even more importantly, the same table reflects that a mere 1.8% of those persons charged with the more serious offenses of driving while intoxicated and reckless driving were ever incarcerated in any way. Surely, based upon these allegedly representative statistics, it would appear that the possibility of anyone charged with a petty offense ever actually receiving any incarceration is covered by the principle of lex non curat de minimis. Your Respondent would suggest that based upon these figures, the prospect of incarceration could hardly be determined "awesome."

Petitioner argues in the alternative that the Equal Protection Clause of the Fourteenth Amendment requires the appointment of counsel to indigent defendants in petty offense cases since the state allows solvent defendants to appear through counsel in these cases. Respondent notes that this argument was not raised by Petitioner in the Florida Supreme Court and was therefore not passed upon by that tribunal. Counsel for Petitioner candidly acknowledges this deficiency. (See Petitioner's brief

at page 36). The law is clear that this Court will not decide federal constitutional issues raised for the first time on review of state court decisions and that this Court has no jurisdiction unless said federal question was raised and decided in the state court below. This principle was reaffirmed in the recent case of Cardinale v. La., 399 U.S. 437 (1969). Inasmuch as this issue was not presented to the Florida Supreme Court and was not passed upon, Petitioner may not raise it before this Court.

Alternatively, Respondent maintains that if this argument is true, then the state actually should be required to appoint counsel in all types of law suits since in all types of law suits solvent defendants are allowed to appear through counsel. Taken to its logical conclusion, acceptance of Petitioner's position in this regard would be to constitutionally require "socialized litigation" or "judicare." In almost every type of legal or administrative proceeding, persons who desire to be represented by counsel are allowed to do so. If in every instance where the state allows solvent defendants to appear through counsel (even though the person may well be squandering his money), the state then has the constitutional obligation to appoint counsel to those who allege they could not afford same, then indeed "judicare" has come.

Petitioner may attempt to state that his position is different from other defendants since he faces the prospect of incarceration but it is submitted your Respondent has already demonstrated through the Petitioner's own statistics, the *di-minimis* nature of that argument. Moreover, in other cases where this Court has held, under the equal protection clause, that counsel need not be appointed, the harm facing the litigant can certainly be described as no less harsh than those facing Petitioner, to-wit: the funds which the litigant needs for he and his family to continue living. See Goldberg v. Kelly, 379 U.S. 254 (1970). The same might be said of the indigent civil defendant faced with a foreclosure action on his home. This Court has already announced as a matter of constitutional principle that where due process is involved "labels" do not count. In Re Gault, supra. Certainly, in the above-mentioned instances of "civil" litigation, the awesome consequences facing the indigent litigant were no less, nay, they were much more, than the consequences facing this allegedly indigent litigant.

Moreover, equal protection must be afforded to all regardless of whether the proceedings are "civil" or "criminal". Petitioner is suggesting that equal protection requires appointment of counsel to indigents in any case where the state or federal government allows a solvent defendant to appear through counsel. There is no authority to support such a proposition. Indeed, this Court's decision in Sanders v United States, 373 U.S.

1 (1963), decided the same day that Gideon was decided, stands as authority to the contrary, for there it was clearly indicated that the appointment of counsel in a habeas corpus proceeding is discretionary, and lower federal courts have so held. LaClair v. U. S., 7th Cir 1967, 374 F.2d 486; Roach v. Bennett, 8th Cir. 1968, 392 F.2d 743 and the cases cited in footnote 3 at p. 748; and Queor v. Lee, 5th Cir. 1967, 382 F.2d 1017. Respondent, however, knows of no prohibition against a petitioner in habeas corpus from appearing through retained counsel.

Respondent urges that due process does not require the appointment of counsel in petty offense cases and that if due process is satisfied then equal protection is likewise satisfied. To require that counsel be at least offered to an indigent in every case would amount to inverse discrimination against solvent individuals. This is so because every indigent would accept the services regardless of the value thereof since he does not have to personally bear the expense. The solvent defendant, on the other hand, would continue to make a practical decision of whether he would be better off to pay the fine than to pay an attorney's fee and the fine. The end result is that all indigents would have counsel in every instance whereas solvent persons charged with petty offenses would frequently appear without the benefit of counsel. Respondent respectfully submits that such a condition would not be equal protection of the law. Cf. Williams v. Illinois, 399 U.S. 235 (1970).

CONCLUSION

For the reasons stated herein and upon the authorities cited, Respondent urges that the decision of the Florida Supreme Court be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Respondent has been forwarded, via U. S. Mail, to

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